Tendencies in American Constitutional Law

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Recommended Citation
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TENDENCIES IN AMERICAN CONSTITUTIONAL LAW

DURING the four years which have elapsed since the political and legal conversion of Justice Roberts, in the early part of the year 1937,† remarkable changes have occurred in the judge-made part of the United States constitution. Things which had been unconstitutional prior to that time have become constitutional, and things which were constitutional prior to that time have become unconstitutional. The supreme court has expressly overruled more than twelve prior decisions² and has impliedly overruled many more than this.³ On this date the judicial winds violently shifted. A new United States constitution has emerged.

Prior to 1937 the constitution forbade minimum wages for women either by the federal government or by the states; now it permits them both by state and by federal fiat. Prior to 1937 the constitution gave the states and the federal government reciprocal immunities from the taxation of each other’s instrumentalities; now it gives them reciprocal powers of non-discriminatory taxation. Prior to 1937 the constitution forbade multiple taxation by the states; now this is no longer forbidden. Prior to 1937 the constitution forbade the federal government to pass an A.A.A. Act under the taxing power; now, if not then, it permits this government to pass such a law under its police power. Prior to 1937 the constitution

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¹West Coast Hotel Co. v. Parrish, (1937) 300 U.S. 379.
would not permit the federal government to regulate labour relations in producing industries; now it permits it to do so. Prior to 1937 the constitution forbade state and federal legislation to outlaw yellow-dog contracts; now it encourages them to do so. Prior to 1937 the constitution forbade the federal government to tax federal judges' salaries; now there is no such prohibition. Prior to 1937 the constitution forbade legislation permitting picketing; now it has withdrawn this prohibition. Prior to 1937 the constitution forbade the delegation of legislative power which it now allows to be delegated. Prior to 1937 the constitution required the supreme court to apply its own common law instead of state common law in matters of general commercial importance; now it requires the supreme court to apply state common law. Prior to 1937 the constitution made the United States privileges and immunities clause protect all fundamental rights, powers, privileges, and immunities of citizens; now it protects only those privileges and immunities which such citizens have in relation to the federal government.

So great were the changes that many prominent men in the United States were filled with alarm and thought that our constitution was being destroyed, that our capitalistic system was in process of being overthrown, and that cherished liberties were to be subjected to the caprice of tyranny. These men thought the present trends in American constitutional law were revolutionary and dangerous.

It is very easy to discover that there was no reason for these men to be filled with alarm. Slight investigation discloses that about all the supreme court has done in the decisions viewed with alarm has been to reverse decisions of the supreme court rendered by Justices Butler, McReynolds, Sutherland, and Van Devanter in the period of so-called normalcy prior to 1937; to overthrow the dominancy of these justices; and to make the dissents of Holmes, Brandeis, Clark, Stone, and Cardozo the doctrines of the court and the former majority members of the court dissenters. This does not mean that there are no present tendencies in United States constitutional law. There are. But they cannot be understood or evaluated without comparing them with prior trends.

The present constitution bears very little resemblance to the constitution formulated in the constitutional convention. A few of the changes which have occurred have been introduced by formal amendments. Most of the changes have been made by the supreme court, which throughout the whole

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of more than 150 years of the history of the United States constitution has been working over and remaking it.\(^5\)

United States constitutional history may be divided into the following periods: (1) the period of the constitutional convention; (2) the period of the original Bill of Rights; (3) the period of Chief Justice Marshall and Justice Story from the beginning of the nineteenth century to the time of the civil war; (4) the period of Chief Justice Taney, Justice Miller, and Justice Waite from the civil war to the late eighties; (5) the period of Justice Field, Chief Justice Fuller, and Justice Peckham from the late eighties to 1910; (6) the period of Justices Holmes, Brandeis, and Hughes from 1910 to 1922; (7) the period of Justices Butler, McReynolds, Sutherland, and Van Devanter from 1922 through 1936; (8) the period of Justices Stone, Cardozo, and Black from 1937 to date.

Some trends in United States history can be traced through all the periods; other trends can be traced through only certain of the constitutional periods, generally alternating. The present period resembles very closely the period of Justices Holmes, Brandeis, and Hughes; the period of Chief Justice Taney, Justice Miller, and Justice Waite; and to some extent the period of Chief Justice Marshall and Justice Story. The period of Justices Butler, McReynolds, Sutherland, and Van Devanter resembled the period of Justice Fields, Chief Justice Fuller, and Justice Peckham, and to some extent the period of Chief Justice Marshall and Justice Story.\(^6\)

The great constitutional problems in American history have been: (1) Who shall be sovereign? (2) Shall the government of the United States be a dual form of government, or a league of states, or a strong central government? (3) Shall there be a division of governmental powers and functions into executive, legislative, and judicial? (4) Shall some one branch of government be supreme, or shall each branch be independent and co-ordinate? (5) Shall the constitution be amendable without revolution, and if so, in what way? (6) How extensive shall citizenship and suffrage be? (7) How far shall personal liberty be protected against public authority or social control? Constitutional development has related to these problems.

The writer has concluded to treat the question of constitutional trends from the standpoint of topics. In taking the matter up in this way, the trend of constitutional law with reference to each topic will have to be

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\(^6\)H. E. Willis, "Constitution Making by the Supreme Court since March 29, 1937" in 15 *Indiana Law Journal* (1940), at pp. 179 ff.
traced through all the periods instead of all of the periods through the topics. The topics to be considered will be sovereignty, amendability, universal citizenship and suffrage, separation of powers, dual form of government, supremacy of the supreme court, and protection of personal liberty against social control.

The only topics, or doctrines, placed in the constitution by the constitutional convention and by formal amendments were those of separation of powers, amendability, universal citizenship and suffrage, and protection of personal liberty against social control. The topics, or doctrines, of dual form of government and supremacy of the supreme court were placed in the constitution by the supreme court through Chief Justice Marshall. The topic, or doctrine, of popular sovereignty has been placed in the constitution by the continuing work of justices in all the periods from the time of Chief Justice Jay, through Chief Justice Marshall, down to the present justices. However, the doctrines placed in the constitution by the constitutional convention and by formal amendments have been so worked over by the supreme court that they are almost as much a product of the supreme court as the doctrines made solely by it. It should also be noted that justices in different periods have not differed as to the fact of constitutional doctrines but as to their scope and application.

**Sovereignty**

So far as concerns sovereignty, the general tendency of American constitutional law has been in the direction of narrowing the definition of sovereignty and of placing the location of sovereignty in the people of the United States as a whole. The supreme court has not been so much concerned with the definition of sovereignty as with its location, but a narrow definition that “the very meaning of sovereignty is that the decree of the sovereign makes law” was adopted in the period of Holmes, Brandeis, and Hughes and this still stands. Probably the position of the constitutional convention was that the people of the United States as a whole are sovereign. This is shown by the preamble of the constitution and by its adoption by conventions in the various states. However, the constitution itself is silent upon the subject and for this reason the establishment of the doctrine has taken long years of struggle and discussion.

The first judicial pronouncement upon the subject was made by Chief Justice John Jay in the early case of Chisholm v. Georgia. Chief Justice Jay was of the opinion that both sovereignty and the unappropriated lands of the country passed from England to the whole people; and for this

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2(1793) 2 Dall. 419.
reason he held that a state was liable for its wrongful acts and could be sued by a citizen of another state although a private individual. This decision aroused so much opposition that the formal eleventh amendment was added to the United States constitution. However, this amendment only repudiated the liability of a state to be sued by a citizen of another state. It did not change Jay's doctrine of sovereignty. The states were still liable to suit by another state and by the United States. Chief Justice Jay did not decide whether the people of a specific state had some residual sovereignty.

For a long time after Chief Justice Jay there was dispute as to where sovereignty resided. Thomas Jefferson and Spencer Roane in particular took the position that the United States constitution was a compact between the states (or the people of the states) and the federal government, and that under this compact there was a divided sovereignty, part of it being in the federal government and part of it being in the state governments. Chief Justice Marshall had the same point of view with reference to sovereignty which had been championed by Chief Justice Jay. He, like Jay, felt that all sovereign power resided in the people and not in the states and that the general government's powers were delegated to it by the people rather than by the states and that as a consequence "it is a government of all, its powers were delegated by all, and it represented all." Marshall probably believed in the complete sovereignty of the people as a whole, although he did not decide whether or not there is some residual sovereignty in the people of each state. President Monroe certainly believed in the sovereignty of the people as a whole.

Chief Justice Marshall's position was not immediately accepted by all political leaders. President Andrew Jackson struck a blow at state sovereignty. However, in this general period secession was threatened by Massachusetts, by all the New England states, and by South Carolina, on the theory that each of them was sovereign and could withdraw from the Union if it chose to do so. Chief Justice Taney held in the case of the Rhode Island rebellion that the question of whether or not a state had a "republican form of government" was a political question for congress (or for the president) rather than for the supreme court. The Missouri compromise went on the theory of a confederation of the states. The civil war climaxd the development of the states' rights, or state sovereignty

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doctrine, for secession was grounded on the theory of state sovereignty and that the compact between the states and the federal government had been broken by the other party to the compact. However, the Union cause was grounded on the theory of popular sovereignty and on the coercive power of the federal government to act on individuals and to suppress insurrection. The triumph of the Union forces in the civil war destroyed state sovereignty. President Abraham Lincoln followed President Jackson in regarding the secessionists as citizens of the United States and not members of a state corporation. Yet Chief Justice Chase in an opinion rendered after the civil war wrote, "The Constitution looks to an indestructible Union of indestructible states."12

Not much more development in the doctrine of sovereignty occurred until the time of Justices Holmes, Brandeis, and Hughes. In the time of these men the supreme court finally and definitely took the position that in the United States sovereignty resides in the people as a whole, that neither the states nor the people of the states as such are sovereign, but that the people of the whole country as organized in our form of government possess all the sovereign power possessed by anybody in the United States.13 For this reason the people of the United States as a whole could impose the nineteenth amendment on Maryland and the eighteenth amendment on Connecticut and Rhode Island in spite of the fact that the people of those states did not vote therefor. The people of the United States as a whole, under the amending power, could take from the states any sovereign powers which they had been exercising and delegate them to the federal government though it might thereby entirely destroy all dual form of government. The correct present constitutional doctrine therefore is that neither the federal government nor the state governments are sovereign, but each is only an agency of the sovereign people, exercising those powers which the latter have seen fit to delegate to them to exercise. The power to give is the power to take away. This logic finally sounded the death blow to any doctrine of state sovereignty;14 and this position of the supreme court has at last been generally accepted by the country as a whole and is the doctrine at the present time. Of course the twenty-first amendment repealed the eighteenth amendment, but the twenty-first amendment worked no change in the doctrine of sovereignty.

12Texas v. White, (1868) 7 Wall. 700, 724-5; but cf. White v. Hart, (1871) 13 Wall. 646.
So far as concerns dual form of government in the United States, there has been no general tendency throughout United States history except so far as concerns foreign relations. Rather the tendency has been for constitutional development to swing back and forth, now towards favouring the states and now towards favouring the federal government. At the present time the tendency seems to be favouring both governments, but if any preference is shown, it is in favour of the state governments. So far as concerns foreign relations, the trend has been in the direction of federal power until now as to them; there is no dual form of government.\(^{15}\)

In the beginning the tendency was toward the establishment of the doctrine of a dual form of government itself. The constitutional convention did not expressly write into the original constitution a doctrine of a dual form of government, although it put into this document most of the materials which were later used in the making of the doctrine. In the post-constitutional convention period the doctrine of a dual form of government was probably accepted. Hamilton, on the one hand, really did not desire a dual form of government but a strong central government with the states merely administrative units of the federal government, as counties and cities are administrative units of the state governments; but after the adoption of the original constitution, he probably assumed that a dual form of government either was implicit in the original constitution or would gradually emerge. Jefferson and Roane, on the other hand, desired merely a league of the states rather than a dual form of government; but they, like Hamilton, probably realized that the original constitution contemplated more than what they desired. Chief Justice John Marshall is entitled to more credit than anyone else for the establishment of a dual form of government in the United States and for the enlargement of federal powers. This he did in two of his most celebrated decisions. One involved the commerce power\(^{16}\) and the other involved the implied powers of the federal government.\(^{17}\)

But at first, in spite of his famous decisions, his doctrine was not generally accepted. Jefferson, for example, continued to maintain that the federal government had no implied powers, that the word "necessary" in the constitution meant absolutely necessary, and therefore the federal government had no implied power to acquire territory. The Kentucky and Virginia resolutions sponsored by Jefferson championed state sovereignty, although as a matter of fact the supreme court under the first


\(^{16}\)Gibbons v. Ogden, (1824) 9 Wheat. 1.

\(^{17}\)M'Culloch v. Maryland, (1819) 4 Wheat. 316.
Judiciary Act was exercising jurisdiction over state courts. The Missouri compromise rested on the assumption that the United States was a confederation of states and that it could not impose conditions on territories for admission to the Union. Calhoun and even Pinkney championed this viewpoint. They also held that newly acquired territory was the common property of the states.

According to Marshall neither the states nor the federal government was sovereign. Sovereignty resided in the people and both the state governments and the federal government were agencies of the sovereign people. The sovereign people, by means of the federal constitution, had made a division of governmental powers between these two agencies. But Marshall took the position that the federal government had not only the powers expressly given to it, but all other powers necessary and proper to carry out the express powers so given, and that in case of conflict between the powers given to the federal government and the powers given, or reserved, to the states, the powers of the federal government would prevail over the powers of the states. He thereby established within the doctrine of a dual form of government another doctrine of federal supremacy.

In the period of Chief Justice Taney and Justice Miller the supreme court continued judicially to uphold the doctrine of a dual form of government as established by Chief Justice Marshall, except for his doctrine of federal supremacy. Chief Justice Taney, contrary to expectation, did not undertake to establish state sovereignty; he even took a liberal position with reference to the admiralty power of the federal government. Yet he believed in the concurrent power of the states and the federal government over interstate commerce, and in the matter of social control favoured the states and their police power not only over the subject of slavery but over corporations. Justice Miller championed much the same position. He refused to extend the scope of the United States privileges and immunities clause. Other justices of this period agreed with this point of view. They created a doctrine of reciprocal immunity from taxation by both the state and federal governments of the instrumentalities of each other. Yet in this period the court enlarged the powers of the federal government in the case of admiralty, interstate commerce, and legal tender.

21Slaughter-House Cases, (1873) 16 Wall. 36.
23Cooley v. Board of Port Wardens, (1851) 12 How. 299.
The great battle over a dual form of government, as over sovereignty, of course occurred in connexion with the civil war. The secession of the southern states was grounded on the doctrine of state sovereignty though by conventions of the people of the states. These southern states claimed either that they simply withdrew by nullification the power of some agents whom they had theretofore constituted; or that they merely dissolved a partnership entered into between them and the federal government, because of its violation by the federal government. The position of the Union was grounded on the doctrine of popular sovereignty and the power of the federal government to suppress insurrections. It undertook to act not on the states as states but on the individuals as citizens of the United States. This coercive action had been used by Washington in the case of the Whiskey rebellion, by Jefferson in the case of his embargo, and by Jackson in the case of South Carolina. President Buchanan took the position that the Union was perpetual and the United States had power to protect its own property, yet he did not protect it. Lincoln took the position that the states had no status except in the Union, that they could not secede from the Union without violating the constitution, and that the Union was older and had created the states. He, however, apparently agreed that sovereignty resided not in the Union but in the people of the country as a whole and that the Union was only exercising powers given to it by this sovereignty. He developed the federal war-power so as to establish the law of treason, the law of belligerent rights, the power to suspend the writ of habeas corpus, and the power to confiscate property and emancipate the slaves. When he confiscated property, it was not on the theory of rebellion but under the war power. The final triumph of the Union cause and the creation of dual citizenship by the fourteenth amendment tended firmly to establish the doctrine of a dual form of government. Since that time, Marshall's doctrine of a dual form of government has been accepted not only by the judicial, but by all other branches of the United States government and by all United States leaders and political thinkers; and the battle has been over whether to favour the states or the federal government, i.e., where to strike a balance between their powers.

In the period of Field, Fuller, and Peckham the tendency was to enlarge the powers of the federal government, perhaps because the state governments were active and the federal was not. This was done through the further extension of implied powers, through the enlargement of the

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commerce power of the federal government, and through the extension under the due process clause of the judicial power of the United States over matters of substance and to the protection of corporations. Yet in this period the supreme court also enlarged the powers of the state governments by giving them the privilege of exercising their general police power where it only indirectly or incidentally affected interstate commerce, but this was over the dissents of Justice Field and Chief Justice Fuller. During this period the supreme court upheld Marshall's doctrine of federal supremacy both so far as concerned the police power and as concerned the power of eminent domain, but they did not overthrow the doctrine of reciprocal immunity from taxation established in the period of Taney, Miller, and Waite in the case of Collector v. Day.

In the period of Holmes, Brandeis, and Hughes the tendency was more towards the protection of the powers of the states through controlling the supreme court's power of judicial review. Yet in this period the supreme court helped to enlarge the treaty power and the war power of the federal government.

In the period of Justices Butler, McReynolds, Sutherland, and Van Devanter, somewhat as in the time of Justice Field, the tendency was to limit both the power of state governments and the powers of the federal government. This action of the court raised a suspicion that it was more concerned with the protection of private business than it was with the doctrine of a dual form of government. This tendency to limit the powers of the federal government was manifested: (1) by applying the tenth amendment to the federal commerce power, (2) by requiring a physical movement of goods across state lines for interstate commerce, (3) by

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defining commerce in narrow terms, and (4) by a narrow approach towards the facts making intrastate matters affect interstate commerce.\(^8\)

Today the tendency is in the direction of enlarging the tax powers and the police powers of both the states and the United States, but the states are being favoured more than the United States. For example, instead of a doctrine of reciprocal immunity from taxation there has been established a doctrine of reciprocal taxation of the instrumentalities of each other by both the states\(^3\) and the United States,\(^4\) and the supreme court has permitted the state of the buyer to levy use and sales taxes on goods shipped in interstate commerce.\(^4\) The case of Colgate v. Harvey has been overruled and the limitation placed by this decision on the power of the states under the United States privileges and immunities clause has been abrogated.\(^4\) However, in this period the court has extended the doctrine of federal supremacy again into the field of reciprocal taxation, and in doing so has overruled the case of Collector v. Day and restored Chief Justice Marshall’s doctrine of federal supremacy.\(^4\) In the matter of federal police power the tendency is not to question the hidden motives of the legislative branch, nor to require a physical movement of goods for interstate commerce, but to define commerce in broad terms and to abandon the narrow approach and consider the substantial effect of intrastate activity on interstate commerce.\(^4\)

Yet the no man’s land, where there is no governmental power, continues; certain states are incorporating entities to prey on other states and granting divorces for the citizens of other states contrary to the policy of such states; trade barriers and ports of entry are becoming the order of the day; and the federal courts must apply state common law even when there is need of a uniform rule.

Thus, while the doctrine of a dual form of government was finally established, the relations between the states and the United States within the dual form of government have not been finally or correctly established.

\(^4\)Madden v. Kentucky, (1940) 309 U.S. 83.
The powers of now one, now the other have been enlarged or diminished as the personnel of the supreme court has changed. The present enlargement of the powers of the states is causing conflicts between the various states and between them and the United States and is creating trade barriers to industry and commerce, which can sooner or later only cause a revulsion. To favour the federal government either for a while or permanently will not solve the problem. It begins to look as though either a great many more powers will have to be transferred to congress, or the dual form of government itself will have to be entirely abolished by making the states only administrative units.

Separation of Powers

In the matter of separation of powers, the general tendency of American constitutional law has been in the direction of establishing the supremacy of the supreme court over the other branches of government with the consequent enlargement of the power of judicial review; of creating a great number of administrative commissions and executive tribunals with the consequent modification of the doctrines against the delegation and commingling of functions; and of generally breaking down the divisions of functions. The present tendency in all but the first of these directions is pronounced.

The doctrine of separation of powers has always been a doctrine of American constitutional law. It was established by the constitutional convention—not in so many words but by necessary implication. As thus established it included three branches of government, corresponding governmental functions, a scheme of checks and balances, and independency of the different branches of government. Apparently this constitutional doctrine meant: (1) that each governmental function should be exercised by the branch of government corresponding with such function, except as this was changed by the scheme of checks and balances, (2) that no branch of government could delegate its functions to another branch; (3) that all three functions of government could not be commingled in any one branch; and (4) that each branch of government was co-ordinate and independent of the others. This was a very unscientific if not unworkable scheme of separation of powers, and the subsequent history of American constitutional law has for the most part related to changes and adjustments to make the scheme adjust itself to unanticipated and expanding needs of government.

One of the growths not anticipated by the constitutional convention has been the growth of an administrative branch of government. Yet this has not been made a fourth branch of government, but it has very largely been absorbed and become a part of the executive branch of government.
Washington instituted the administrative branch of government when he established a cabinet.

One of the most bothersome problems connected with separation of powers has been the problem of the independency of the different branches of government. Apparently the constitutional convention contemplated such independency. Jefferson and his followers championed it. However, very early in United States history this doctrine was broken down by what appeared like the substitution for it of a doctrine of legislative supremacy. Congress undertook to assume a position of supremacy over the other branches of government, and what occurred in connexion with the federal government also occurred throughout the United States in connexion with the various state governments, which also subscribed to the same doctrine of separation of powers. The legislatures throughout the United States assumed jurisdiction over the matter of legal procedure and the admission and disbarment of attorneys. They even went so far as to grant new trials for cases tried in courts of law. This encroachment by the legislative upon the judicial branch was not checked until recent times.

Chief Justice Marshall introduced a different doctrine, and that was the doctrine of judicial supremacy and in particular the supremacy of the United States supreme court. This he did by holding that the supreme court could declare an act of congress unconstitutional and pass on the constitutionality of acts of the executive branch of government, and by holding that the supreme court could exercise the same supremacy over all three branches of the various state governments.

Marshall's doctrine of judicial supremacy did not at once completely settle the question of the independency of the branches of government. Independency of the branches of government continued to have its champions. Legislative supremacy continued in the combat. Executive supremacy at different times entered the combat with many evidences of success. Jackson used his veto power not only when he thought legislation unconstitutional but when he thought it was unwise; and he introduced the spoils system, which at first at least gave some advantage to the executive branch of government. During the civil war executive supremacy prevailed. Under Lincoln the writ of habeas corpus was suspended, martial law established, courts-martial exercised a general

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47 *Marbury v. Madison*, (1803) 1 Cranch 137.

48 *Fletcher v. Peck*, (1810) 6 Cranch 87; *Cohens v. Virginia*, (1821) 6 Wheat. 264. See also the recent case of *Sterling v. Constantin*, (1932) 287 U.S. 378.
jurisdiction, and the military power was made supreme. During the world
war much the same thing occurred under President Wilson. During the
great depression President Roosevelt was thought by many to be in the
process of establishing executive supremacy, until the supreme court took
the matter in hand. The executive branch of the government is supreme
over the pardoning power and the removal of most officers. In the
reconstruction days after the civil war, legislative supremacy again pre-
vailed for a short time. Even today the legislative branch of the govern-
ment is supreme over some matters, like the seating of senators and
representatives, political questions, and a republican form of government.
Yet the supreme court, with the possible exception of the war powers
creating executive supremacy, has won a permanent victory in this respect
over the other branches of government.

While the supreme court has thus been destroying the doctrine of
independency of the various departments and establishing in place thereof
the doctrine of the supremacy of the supreme court, it has also modified all
of the other original characteristics of the doctrine of separation of powers
so that it has introduced more changes than did the constitutional conven-
tion in its scheme of checks and balances. In particular, it has permitted
the delegation of legislative and other powers to executive tribunals so that
now all of the functions of government may be commingled and exercised
by them. And while such justices as Butler, McReynolds, Sutherland, and
Van Devanter subjected the decisions of these tribunals to the most exact-
ing judicial review, the present justices of the supreme court are more
inclined to allow the findings of fact of such tribunals to stand without
judicial review.

With the growth of an urban and industrial civilization and the problems
created by the conflicting interests of millions of people thrown into close
contact with each other, there has arisen a need, first, for a regulating or
co-ordinating activity and, second, for a volume of detailed rules and regula-
tions with which the legislative branch of the government is not fitted to
cope. Executive tribunals and administrative commissions are better
calculated to discharge these functions satisfactorily than is a legislative
body. The great problem has been how to fit these tribunals into the
constitutional scheme of separation of powers. Conservatives in the legal

52 Elmhurst Cemetery Co. of Joliet v. Commissioner of Internal Revenue, (1937) 300
U.S. 156; Federal Communications Commission v. Pottsville Broadcasting Co., (1940)
309 U.S. 134; Sunshine Anthracite Coal Co. v. Adkins, (1940) 310 U.S. 381.
profession have been inclined to apply to these many tribunals the old rules as to separation of powers, but the liberals have been inclined to take the position that these new tribunals need new rules, abrogating the rule as to delegation of powers and the rule as to commingling of functions. They believe that experience has shown that the commingling of powers in administrative tribunals is almost necessary for their success. They also feel that there is no need of applying to administrative tribunals the general principles which have been made to apply to the three regular branches of government. The reason for the doctrine of separation of powers is the prevention of tyranny and the consequent destruction of liberty. There can be no danger of this sort from administrative tribunals, so long as they are creatures of, and can be destroyed by, the legislative branch of the government any time. It now looks as though the position of the liberals in the legal profession is going to triumph. Delegation of legislative power is now constitutional if congress sets forth its policy and many executive tribunals are creating social control, administering it, and deciding whether and how it applies to specific persons.

A very recent tendency in American constitutional law, so far as it involves separation of powers, is the subjection of the federal judges to income taxes upon their salaries. In the period of Justices Butler, McReynolds, Sutherland, and Van Devanter it had been thought that the doctrine of separation of powers as well as an express provision in the constitution as to the diminishing of their salaries required the exemption of judges from income taxes. However, the present supreme court has taken the position that this was a bad piece of legal reasoning and has changed the constitutional law upon the subject.

Supremacy of the Supreme Court

The general tendency of American constitutional law, as to the supremacy of the supreme court, has been in the direction of developing and broadening this doctrine, until now (except for a new trend beginning) the supreme court settles questions of social policy and reviews the findings of law and fact of administrative tribunals. This doctrine is really an exception to the United States doctrine of separation of powers and the history of its development has already been set forth in connexion with the topic of "Separation of Powers."

There is nothing in the original constitution upon the subject. The original constitution did not choose any umpire or arbitrator for disputes between the various branches of the federal government, or between the

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federal government and the states, or between these governments and individuals. The establishment of the doctrine as one of the fundamental characteristics of American constitutional law has been due to the work of the justices of the United States supreme court. They have taken the power to themselves.

Jefferson was of the opinion that there was no constitutional arbitrator either between the various branches of the federal government, or between the federal government and the states. He also took the position that the supreme court had no appellate jurisdiction over the state courts, and that the supreme court had no amending power. He felt that one branch of the federal government had as much right as another to decide as to the nature of its powers, and that the states had as much right as the federal government to decide conflicts between them. If anything, he probably thought that the final power was lodged either in the legislatures (or the people) of three-fourths of the states, or in the absence of action by them in an individual state. The Kentucky and Virginia resolutions followed this philosophy. Madison thought that it might be implied that the supreme court was an arbitrator between the states and the nation, but not between the branches of the United States. Pennsylvania urged an amendment to the constitution for the establishing of an impartial tribunal to arbitrate between the states and the United States.

Chief Justice Marshall, as we have already shown, is entitled to credit for the doctrine of the supremacy of the supreme court, both over other branches of the federal government and over the various branches of the state government. But throughout United States history, no matter what the period, other justices of the United States supreme court have been practically unanimous in following the position of Chief Justice Marshall. Chief Justice Taney, if possible, went even further in upholding the doctrine than did Chief Justice Marshall, except so far as concerns political questions. Justice Miller and other associates of Chief Justice Taney followed in his footsteps. In this period the supreme court overruled acts of congress passed for the protection of negroes, but it upheld the separation of powers to the extent of refusing to mandamus the president. Justices Field and Peckham and Chief Justice Fuller of the next

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55Marbury v. Madison, (1803) 1 Cranch 137.
56Fletcher v. Peck, (1810) 6 Cranch 87; Cohens v. Virginia, (1821) 6 Wheat. 264.
58Luther v. Borden, (1849) 7 How. 1.
60State of Mississippi v. Johnson, (1866) 4 Wall. 475.
constitutional period did more than even Chief Justice Taney to develop the supremacy of the supreme court. This they did in a conspicuous way in creating the power of judicial review over matters of substance so as to exercise the function of determining social policy.61 While Justices Holmes, Hughes, and Brandeis in the next period believed in practising voluntary self-restraint in the exercise of the power of judicial review, they did not at any time question the fact of the power,62 and they aided the growth of administrative agencies by permitting a new delegation and commingling of powers.63 In the next period Justices Butler, McReynolds, Sutherland, and Van Devanter pressed judicial review both of Acts of legislatures and of findings of administrative tribunals if possible even further than did Justices Field, Peckham, and Chief Justice Fuller.64 The present justices have overruled many of the decisions dictated by Justices Butler, McReynolds, Sutherland, and Van Devanter and have been inclined to exercise the same voluntary restraint on their power which Justices Holmes and Brandeis exercised, but none of them has indicated that he wants to surrender the power of judicial review or his supremacy over the other branches of the federal government.65 This unanimous judicial opinion has finally established the supremacy of the supreme court as a permanent and most characteristic distinction of United States constitutional law. The fact that the supreme court can at any time assert its supremacy over the other branches of government, as it did in the case of President F. D. Roosevelt,66 shows that the doctrine of the supremacy of the supreme court is in no danger of overthrow.

The people of the United States now not only acquiesce in the exercise of this overlordship by the United States supreme court, but they believe that the supreme court should have it and is the one branch of government that has exercised its powers in commendable fashion. The only questions in this connexion are with reference to whether the supreme court instead

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of legislatures should determine questions of social policy, and whether the supreme court instead of administrative tribunals should determine questions of fact.

The supreme court has determined social policy only about sixty years. Justice Field more than anyone else was responsible for the supreme court taking to itself this power. Many think that so far as matters of this sort are concerned, legislative judgement is fully as good as the judicial judgement; and that it might have been wise for the supreme court never to have taken the power. The chief criticisms of the decisions of the supreme court have occurred in connexion with its decisions on matters of social policy. If the court should cease to exercise this power, it would probably help its prestige. If the supreme court did not have the power to arbitrate between the states and the federal government and between the various branches of the federal government, there is a very great likelihood that the United States form of government might go to pieces, and the United States constitution fail as a great fabric of democratic government; but to have the supreme court cease to determine matters of social policy would have no effect upon either the American form of government or the United States constitution. However, there is no present indication that the supreme court is likely to put this voluntary limitation upon itself; but there are many organizations in the United States which are beginning to advocate an amendment to the United States constitution which would have this effect.

The effectiveness of the work of administrative tribunals is largely destroyed by substituting an independent judicial determination for administrative finality, and there are indications that the present supreme court is going to limit judicial review in this field.

**Amendability**

In the matter of amendability, American constitutional law has tended in the direction of broadening the scope and simplifying the method of amendment, even to giving the supreme court amending powers.

The doctrine of amendability of the constitution was a doctrine created by the original constitution. But if it had not been for the work of the supreme court in improving it, there are many indications that the constitution would never have endured for the more than 150 years of its existence. Yet Jefferson and Madison believed that no changes in the American constitution should be made except by formal amendments. They probably were voicing the attitude of the constitutional convention. Luckily they did not voice the need of the people of the United States, nor the best constitutional policy.
The supreme court has broadened and simplified the methods of amending the constitution by doing two different things. In the first place it has clarified and interpreted the provisions in the original constitution so as to eliminate inconsistencies and obscurities. Thus it has held that the legislatures of the states in acting under the amending power are not acting as agencies of the state governments but as agencies of the amending process; that neither the president's approval of a proposal of an amendment nor the governor's approval of a ratification of an amendment is necessary; and that there are no implied limitations upon the amending power.

In the second place the supreme court, under the doctrine of the supremacy of the supreme court, has taken to itself the power to amend even the constitution. This action by the supreme court is more significant and important than what it did in the matter of clarifying and interpreting the express provisions in the constitution. By itself amending the constitution, the supreme court has made it easy to modify and change it to keep it abreast with economic and social developments and to make it a workable document for new and unanticipated situations. The power thus to amend the constitution was begun to be exercised in the time of Chief Justice Marshall and has continued throughout United States constitutional history and is as great a present as it has been a past tendency. Among some of the amendments to the United States constitution made by the supreme court may be mentioned the establishment of the doctrine of sovereignty of the people of the United States as a whole, the establishment of the supremacy of the supreme court, the establishment of a dual form of government, a definition of interstate commerce, the determination of the powers of the federal government and the state governments with reference to interstate commerce (dual form of government), the protection of religious liberty and freedom of speech and the press against state action, the guarantee of certain forms of legal procedure against state action, and the limitations on state and federal action by the due process clause as a matter of substance (protection of personal liberty against social control).

Universal Citizenship and Suffrage

The tendency of American constitutional law so far as it involves the doctrine of universal citizenship and suffrage has tended in the direction of widening citizenship and suffrage.

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63H. E. Willis, Constitutional Law of the United States (Bloomington, Indiana, 1936), chap. iv.
The original United States constitution did not prescribe or proscribe either political, or social, or economic democracy. The people of the United States have not as yet attained either social, or economic democracy. There are social classes in the United States somewhat as there are in England. The shrewd and unscrupulous have succeeded in creating an economic plutocracy on the basis of a professed democracy. But gradually the people of the United States have achieved a political democracy. This was first begun in the time of President Jackson. At first in the United States political power had been given only to the rich and well-born, that is the property owners. But the states of the Mississippi valley began to extend suffrage; then Maryland, South Carolina, Massachusetts, and New York adopted white manhood suffrage (partly to prevent the migration of wage workers). Finally the fourteenth amendment to the United States constitution gave universal citizenship, and the fifteenth and nineteenth amendments established universal suffrage, except as non-discriminatory qualifications might be required of all.\(^7\)

Of course as a practical matter neither citizenship nor suffrage is universal. There are many aliens residing in the United States who are not citizens either of the United States, or of any state. There are many citizens in the United States who either because of non-discriminatory requirements, or because of subversive requirements, or because of sheer neglect on their own part do not participate in the elective franchise.\(^7\) This, however, does not change the constitutional fact, which is that under the United States constitution there is universal citizenship and suffrage.\(^7\)

**Protection of Personal Liberty against Social Control**

The general tendency in American constitutional law, though the tendency has swung back and forth in different periods, has been to protect personal liberty more and more against control or destruction by other organized or unorganized private individuals and less and less (except as to fundamental rights) against control by government.

While the United States has never been a land of either social or economic equality, and at first not of political equality, yet it has been a land of liberty and individualism. In fact, this characteristic of American life has been one of the first factors in the destruction of social and economic equality and the creation of social aristocracy and economic plutocracy. The original pioneers of the United States preferred liberty

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\(^7\)H. E. Willis, *Constitutional Law of the United States* (Bloomington, Indiana, 1936), chap. iv.


\(^7\)United States v. Wong Kim Ark, (1898) 169 U.S. 649.
to equality. They believed in individualism and laissez-faire no matter what the consequences. Of course in time the consequences became very serious; and it was this which gradually forced the United States supreme court to reconstruct American constitutional doctrine, even though it was at the expense of personal liberty, so as to eliminate some of the terrors of individualism, through subjecting it to external political social control.

However, there have been two schools of thought with reference to this matter. One school of thought throughout United States history has continued to believe in the old shibboleth of individualism and personal liberty, while the other school has believed it more important to create an ideal social order. Yet these two schools of thought have not been so far apart as it might seem. Both have believed in the use of governmental power. The difference between the two schools has for the most part been this, that the first school has believed in using governmental power for the protection of the personal liberty of business men, while the other school has believed in the use of governmental power to control the personal liberty of business men.

The constitutional convention was dominated by the first school of thought. One of its chief purposes was the establishment of a constitution which would protect personal liberty against political social control. The original constitution did not say this in so many words, but it is not difficult to read it between the lines. The framers of the original constitution by the division of powers between the states and the federal government, division of powers between the various branches of the federal government, and their scheme of checks and balances not only wanted to establish a form of government which would prevent usurpation of autocratic power by any branch of government, but also to set up a government so weak that it could offer a minimum of interference with personal liberty. In this indirect way they hamstrung the federal government so as to make it incapable of offering any great danger to the personal liberty of the pioneers. The personal liberty of certain individuals, as for example the creditor class, was directly protected against any social control, through such clauses in the constitution as the clause forbidding a state from passing any law impairing the obligation of contracts, the fugitive slave clause, and the clause making all debts contracted before the adoption of the constitution as valid against the United States as under the confederation.

The supreme court has been dominated now by one now by the other school of thought. The justices who have believed in, and tried to protect, personal liberty, especially that of business men, have been the justices dominating the court in the periods of Chief Justice Marshall; of Justices
Field and Peckham and Chief Justice Fuller; and of Justices Butler, Mc-Reynolds, Sutherland, and Van Devanter. And the justices who have believed in and have extended social control by government to delimit liberty, especially of business men, for the establishment of an ideal social order have been the justices dominating the court in the periods of Chief Justice Taney and Justice Miller; of Justices Holmes, Brandeis, and Hughes; and of Justices Stone, Cardozo, and the recent appointees of President F. D. Roosevelt. The same division which has existed between the justices of the supreme court has also existed between the chief executives and other political leaders of the United States. The people opposed to social control have generally been labelled conservatives and those favouring social control, liberals.

Chief Justice Marshall did not do much in the way of limiting the powers of the federal government. Perhaps one reason for this was because the federal government was not as yet undertaking to exercise much social control. He did, however, very greatly limit the powers of the various state governments through the use of the contract clause. This clause forbade any state from passing a law which would impair the obligation of a contract. He held that this guarantee protected individuals not only against a law which would impair the obligation of the executory contracts of private individuals, but the executory contracts of state governments, and even the obligation found in executed contracts of individuals and state governments. 73 Probably Chief Justice Marshall would have made the contract clause protect even freedom of contract, but he could not carry the rest of the supreme court along with him on this point. 74 However, in his celebrated Dartmouth College decision 75 he did succeed in carrying the rest of the court with him in extending the contract clause to the protection of the personal liberty of corporations by holding that the charters granted to corporations were contracts, though executed, and, for some strange reason, not subject to the power of taxation, the power of eminent domain, or the police power. 76 Because of this, corporations enjoyed almost complete freedom from social control for about sixty years. This did much to encourage the corporate form of business organization and to make United States civilization a corporate civilization. Marshall also protected the personal liberty of business men to some extent through the commerce clause and other provisions in the constitution, but his great work in so doing occurred in connexion with the contract clause.

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74 Ogden v. Saunders, (1827) 12 Wheat. 213.
The work begun by Chief Justice Marshall was continued by the justices who dominated the supreme court in the period of Justices Field and Peckham and Chief Justice Fuller. Justice Field, while a dissenting judge in the period of Chief Justice Taney and Justice Miller, had tried to use the United States privileges and immunities clause of the fourteenth formal amendment for the protection of personal liberty against state action, but he failed by a narrow margin. However, in the late eighties and early nineties after a change in the personnel of the court, he succeeded in making the due process clause of the fourteenth amendment do all that he had wanted to make the United States privileges and immunities clause do, that is, protect personal liberty against state action, on the theory that such state action would as a matter of substance deprive persons of their life, or liberty, or property without due process of law. To climax this constitutional development, Justice Field and his associates extended the protection of the due process clause of the fourteenth amendment to the protection of the property rights of corporations. This meant that personal liberty would be protected, or social control allowed as the personnel of the supreme court might change. So long as Justice Field and those agreeing with him dominated the supreme court, it meant a minimum of social control. A conspicuous illustration of the prohibition of social control was found in the refusal of the supreme court in an opinion by Justice Peckham to allow New York to control the hours of labour in bakeries. Justice Field and his disciples also protected the personal liberty of business men by the commerce clause and other clauses in the constitution. For example, Chief Justice Fuller, more than any other justice, succeeded by the use of the commerce clause in protecting the personal liberty of brewers and distillers against state prohibition laws.

In that period of United States constitutional history when Justices Butler, McReynolds, Sutherland, and Van Devanter dominated the supreme court, the protection of personal liberty of business men was, if anything, even greater than it had been in the period of Justices Field and Peckham and Chief Justice Fuller. Public utilities especially were protected under the due process clause against the regulatory power of public

77 Slaughter-House Cases, (1873) 16 Wall. 36.
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Service commissions. In some of these decisions they were given a net rate of return of over 8 per cent\(^2\) when interest rates on investments with similar security ran no higher than 4 or 5 per cent and the companies were able to sell their own bonds for 4 or 5 per cent and their preferred stock for 6 per cent; and they were given this rate of return on a rate base of reproduction cost,\(^3\) though this rate base was more than double any amount of money ever prudently invested in the enterprise. Freedom of contract was protected under the due process clause against the guarantee of minimum wages,\(^4\) and the due process clause was also invoked to protect creditors against regulation by congress for the protection of farmers.\(^5\)

As though to outdo the work of Field, Fuller, and Peckham, the justices of this period did what Justice Field failed to do—made the United States privileges and immunities clause protect the general liberty of people against state action.\(^6\)

In the period of Chief Justice Taney, Justice Miller, and Chief Justice Waite the court did not believe in protecting personal liberty to the extent that it has been protected by the justices heretofore considered. Chief Justice Taney tried to limit the protection of corporations through a rule of strict construction of their charters. He did not overrule the Dartmouth College Case, but by his rule of strict construction he did protect the public interest where charters were carelessly drawn.\(^7\) However, this rule of strict construction did not accomplish much after charters were more carefully drawn. Hence, to have more social control, it was necessary to do more than use a rule of strict construction. Finally Miller, Waite, and other justices modified the rule of the Dartmouth College Case by holding that corporate charters were subject to the states’ power of eminent domain\(^8\) and police power;\(^9\) and that private contracts, though not public contracts, were subject to the states’ power of taxation.\(^9\) No further modification of the Dartmouth College doctrine has been made up to the present time, so that it is still constitutional law that the charters of corporations are protected against the states’ exercise contrary to a pro-

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\(^{84}\) Adkins v. Children's Hospital, (1923) 261 U.S. 525.


\(^{88}\) The West River Bridge Company v. Dix, (1848) 6 How. 507.


vision therein either of their power of taxation or their police power over rates, or the franchises of corporations. But even with these exceptions the changes made by the supreme court, even at first, were so great that Justice Story and Chancellor Kent lost all hope of the constitutional guardianship of the capitalistic system by the supreme court and prophesied that the anti-capitalistic attitude of the court would arrest all new improvements and progress. It is interesting to note how ill-conceived and repetitive gloomy forebodings may be.

In the period of Justices Holmes, Brandeis, and Hughes the court was dominated by justices who had the point of view of Chief Justice Taney, Chief Justice Waite, and Justice Miller. In this period more social control became the order of the constitutional day. Yet they did not accomplish their purpose so much by modifying the fundamental law as to the contract clause and the due process clause as by their method of applying this fundamental law to specific situations. Where Field, Fuller, and Peckham in the period before them or Butler, McReynolds, Sutherland, and Van Devanter in the period after them would not have been able to find a sufficient social interest for the police power, or a sufficient public purpose for the power of taxation, they were able to find such a social interest and such a public purpose. For example, they were able to find a sufficient social interest for the regulations of hours of labour, protection of natural resources, protection of human resources, protection of general cultural progress, and protection of individual life; and a sufficient public purpose for modified government ownership, and for public needs where private enterprise was inadequate. But while the liberal justices of this period were subjecting business men to all kinds of social control, they were at the same time protecting the personal liberty of individuals against governmental action where there were involved the fundamental liberties of religion, or speech, or due process as a matter of legal procedure.

93Hudson County Water Co. v. McCarter, (1908) 209 U.S. 349.
98Milheim v. Moffat Tunnel Improvement District, (1923) 262 U.S. 710.
100Patterson v. Colorado, (1907) 205 U.S. 454.
In the present period of American constitutional law the dominancy of the liberals is again manifest. The present liberal court controlled by Justice Stone and the recent appointees of President F. D. Roosevelt has a constitutional point of view corresponding very closely to that of Justices Holmes and Brandeis in the period from 1910 to 1922; Chief Justice Taney and Justice Miller from the time of the civil war to the late eighties; and in many respects, especially in connexion with the federal government’s interstate commerce power, with that of Chief Justice Marshall in the period dominated by him prior to the civil war. Their point of view is diametrically opposed to the constitutional point of view of Justices Butler, McReynolds, Sutherland, and Van Devanter, who generally controlled the court from 1922 to 1936; Justices Field and Peckham and Chief Justice Fuller, who generally dominated the court from the late eighties to 1910; and to Chief Justice Marshall and his court so far as concerns the protection of corporations under the contract clause.

The liberals today, as always, are protecting the fundamental interests of personal liberty guaranteed by the bill of rights, if anything, even more than the conservatives would do. For example, under the due process clause as a matter of substance they have protected freedom of speech, even to the extent of protecting the circulation of leaflets\(^\text{102}\) and the practice of picketing;\(^\text{103}\) religious liberty;\(^\text{104}\) and the privilege of peaceable assemblage;\(^\text{105}\) and under the due process clause as a matter of procedure they have protected an accused against torture.\(^\text{106}\) They also under the equal protection clause have protected negroes in their right to a legal education against state discrimination where such education is provided only through the payment of tuition for study outside the state.\(^\text{107}\)

The present liberal court, where fundamental rights are not involved, has permitted more social control both by the state governments and the federal government. In all of the periods the supreme court has been fairly liberal towards the use of the power of eminent domain, and the present court has continued this policy.\(^\text{108}\) The greatest liberality has occurred in the case of the police power. The court has upheld a state

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\(^{102}\) Lovell v. City of Griffin, (1938) 303 U.S. 444.


minimum wage law.\textsuperscript{109} It has upheld a second federal Agricultural Adjustment Act\textsuperscript{110} and the Social Security Act\textsuperscript{111} and the federal government’s power over interstate commerce\textsuperscript{112} to such an extent that it repudiated most of the work on interstate commerce of such Justices as Butler, McReynolds, Sutherland, and Van Devanter.\textsuperscript{113} It has also been very liberal so far as the police power of the states has been concerned.\textsuperscript{114} It has shown even as great liberality in the matter of state and federal taxation. It has relaxed the rule against reciprocal immunity from taxation of the state and federal governments and has substituted for it a rule of reciprocal non-discriminatory taxation.\textsuperscript{115} It has permitted use taxes\textsuperscript{116} and sales taxes\textsuperscript{117} by the buyer’s state on goods shipped in interstate commerce and has reversed its prior position as to jurisdiction to tax intangibles,\textsuperscript{118} so as again to permit multiple taxation of intangibles by different states.\textsuperscript{119} It also has reversed the position of its predecessors on the scope of the United States privileges and immunities clause, so as to go back to the position taken by the court in the time of Justice Miller.\textsuperscript{120}


\textsuperscript{110}Mulford v. Smith, (1939) 307 U.S. 38.


\textsuperscript{116}Hennepford et al. v. Silas Mason Company et al., (1937) 300 U.S. 577.

\textsuperscript{117}McGoldrick v. Berwind-White Coal Mining Co., (1939) 309 U.S. 33.


What of the future? Will the pendulum of judicial preference continue to swing back and forth from personal liberty to social control? The safest answer is, yes; but perhaps it will gradually swing more and more to social control and to the protection of personal liberty by social control against the action of a few industrialists and financiers. Yet no final solution of this problem can come for long years in the future. The solution will have to wait the event of changing future economic and social conditions. But of one thing we can be sure—the supreme court must correct the mistake, made by some foreigners and some of our own business magnates, of identifying personal liberty with capitalism, which already has to so large an extent destroyed free enterprise and individualism.

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